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No. 80-518

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL.
*Petitioners,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. *Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## PETITIONERS' REPLY BRIEF

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## QUESTION PRESENTED

1. Whether the Court of Appeals erred in finding that the Administrative Law Judge should have applied the statutory presumption to whether the Respondent Riley's condition arose out of his employment where substantial evidence has shown that no injury occurred "in the course of" that employment in the first place.

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## PETITIONERS' REPLY BRIEF

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### ARGUMENT

1. The Federal Respondent contends that the Decision of the Court of Appeals did not "finally" dispose of the claim in this case so there is "no reason for this Court to depart from its usual practice of declining to review non-final Orders of Courts of Appeals." (Opposition p.4). The Petitioners' contend, however, that the ruling by the Court of Appeals with respect to the statutory presumption is "fundamental to the further conduct of the case." *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-54, 85 S.Ct. 308, 310, 13 L.Ed.2d 199, 204. Accordingly, Petitioners' contend that

this Court should pass on a pure question of law and thus avoid the "danger of denying justice by delay." *Westcott* v. *Impresas Armadores, S.A. Panama*, 564 F.2d 875, 880-881.

The Federal Respondent also contends that review is "unwarranted" because the Court of Appeals Decision "correctly reflects the . . . purpose of the Section 20(a) presumption and is consistent with the law now in effect in all circuits in which the presumption issue has been considered." (Opposition Brief p.4). Contrary to the Federal Respondent's contention, the cases cited by that Respondent do not indicate that Petitioners' cases have been superseded or reversed in any manner, and do not apply to the factual situation in *Riley*. The decisions cited by the Federal Respondent show only that in later cases the statutory presumption has been *applied* in various decisions in those circuits. Of interest is the fact that in all decisions cited by the Federal Respondent, the question of whether or not there was an injury "*in the course of*" employment was not considered as an issue.

In *Continental Insurance Co.* v. *Byrne*, 471 F.2d 257, 260 (7th Cir.), *cert. denied* 406 U.S. 918 (1972), there was no question about whether or not the claimant longshoreman fell to the bottom of number-one hold suffering substantial injuries. *Id.* at 258. In the Fourth Circuit Opinion of *Newport News Shipbuilding and Drydock Co.* v. *Director, OWCP*, 583 F.2d 1273, 1281 (4th Cir.), *cert. denied* 440 U.S. 915 (1979), the claimant had testified that his symptoms did not predate his employment or exist at the time of his pre-employment physical. There was "no dispute" that his respiratory difficulties became symptomatic only after he was exposed to welding smoke at work. *Id.* at 1281. In *Eller and Co.* v. *Golden*, 620 F.2d 71 (5th Cir. 1980), there was no dispute that the claimant longshoreman on April 11, 1974, was struck from behind by a fork lift truck and in-

jured. *Id.* at 72. In the 8th Circuit Decision of *Ridgely* v. *Ceres, Inc.*, 594 F.2d 1175 (1979), there was no dispute that the claimant was injured on July 10, 1970 in the course of his employment as a longshoreman. *Id.* at 1177.

All of the foregoing cases are similar in that the fact that the injury suffered by the claimant occurred *in the course of employment was undisputed.* The only question in those cases was one of causal relationship between the injury and the disabling condition.

In *John W. McGrath* v. *Hughes*, 264 F.2d 314 (2d Cir.), *cert. denied* 360 U.S. 931 (1959), the Court found that the §20(a) presumption should be applied to a causal relationship situation, that is whether the injury "arose out of the employment." Factually, there was no dispute in the history given to physicians or by the widow that the claimant's symptoms occurred when he was "pulling a rope to help move a barge around the pier." (*Id.* at 316). The language of this Decision seems to support the Petitioners' position herein that the claimant must prove "injury" and is not aided in this instance by the presumption. This is contrary to the Federal Respondent's view of how the presumption applied in the case. In that case, the Second Circuit talked about "sufficient proof" offered to rebut the §920 evidence. The Court cited this Court's Opinion in *Del Vecchio* v. *Bowers*, 1935, 296 U.S. 280, 286, 56 S.Ct. 190, 193, 80 L.Ed. 229, wherein this Court stated about the presumption that:

> [I]ts only office is to control the result where there is an entire lack of competent evidence.

The presumption was used to apply to the causal relationship between the claimant's death at home and his alleged exertion on the job while hauling in a line and moving the barge.

The Third Circuit Opinion in *Marra Brothers* v. *Cardillo*, 154 F.2d 357, (3rd Cir. 1946), involved no dispute concerning whether the longshoreman was working or in the course of his employment. The Court found that the presumption applied to the death of the claimant who was injured "upon navigable waters of the United States." *Id.* at 359.

In the Ninth Circuit case of *Parsons Corp.* v. *Director, OWCP*, 619 F.2d 38 (1980), the Court of Appeals was deciding a case under the Defense Base Act, 55 Stat. 622, 42 U.S.C. 1651. In this Decision there was no dispute concerning whether or not the claimant was in the course of his employment when he discovered his occupational disease. The issue once again involved causalty, and the presumption was held applicable. The case of *O'Keefe* v. *Smith Hinchman and Grills Associates, Inc.*, 380 U.S. 359 (1965) also involved the Defense Base Act. The employer therein considered all of its employees to be "in the course of regular occupation from the time they leave the United States until their return." *Id.* 13 L.Ed. 896. Once again, the only question in this case was whether or not the injury "arose out of" employment. It should further be noted that cases involving the Defense Base Act, while incorporating the statutory provisions and benefits of the Longshoremen and Harbor Workers Act, do not generally involve any issue involving whether or not claimant was "in the scope of" his employment, since they are covered under the Act in the course of regular occupation "from the time they leave the United States until their return." It should also be noted that the Defense Base Act was involved in this Court's determination in *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 1951, 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483.

All of the above cases cited by the Federal Respondent (as well as this decision being appealed from, in-

volving the Respondent Riley) confirm that there is conflict with the Seventh Circuit concerning the applicability of the statutory presumption to the issue of causal relationship, which the Circuit found "inapplicable" to the claimant's injury in *Eschbach* v. *Contractors Pacific Navy Air Bases*, 181 F.2d 860 (1950). The more recent cases show that once the facts indicate that the claimant's injury occurred in the course of his employment, that the statutory presumption applies to causally relate the injury occurring during the course of that employment and the claimant's disability or death. Prior to *Riley* there have been *no cases* which have applied the statutory presumption in the *first instance* to determine that the claimant's injury occurred "in the course of" his employment, thus requiring consideration of the §920 presumption to relate that course of employment to the claimant's disability. In order to rely on the statutory presumption the District of Columbia Circuit first factually decided that Riley's injury occurred "in the course of employment." Having so found, contrary to the Administrative Law Judges finding on this issue, then the Court finds that the causal relationship presumption should have been applied because in their opinion Riley's injury was "employment-bred" (Pet. App. 10a). The Court's opinion thus can be interpreted to read out of the definition of "injury" under the Act (33 USC 920 [2]) the requirement that the injury occur "in the course of employment." This constitutes reversible error since the statute by its terms requires that the injury must be one "arising out of *and* in the course of employment." 33 USC 902(2). As stated in *John W. McGrath Company* v. *Hughes, supra:*

> "But we must still be satisfied that there was sufficient evidence for the Deputy Commissioner properly to find that the alleged incident *truly happened*

> arising out of and in the course of employment, 33 USCA §920(2) . . . " (Emphasis supplied)

It should be noted that in *Riley* there was substantial dispute concerning whether or not an injury had occurred to the Respondent Riley in the course of his employment. After full trial on this issue, the Administrative Law Judge stated that the §20 presumption was "inapplicable to the happening of an accident." (Pet. App. 24a). What the Administrative Law Judge meant is that the statutory presumption does not apply to Riley's "injury" since he found no injury occurred to Riley while "in the course of employment" with the Petitioner, Federal Sheet Metal.

The above cases make the conclusion of the Judge that the claimant sustained "no injury within the meaning of Section 2(2) of the Act on November 19, 1975", and the Court of Appeals' affirmance of that determination most significant.

The Federal Respondent cites the Seventh Circuit decision of *Continental Insurance* v. *Byrne, supra* for authority that the §20(a) presumption (Opposition p. 4) can apply to causally related disability and death, thus ruling "otherwise" than it previously ruled in *Eshbach Contractors, supra.* However, in *Continental Insurance* the Court stated that prior to the operation of the presumption there must be "a doubtful factual question." More specifically the Court stated as follows:

> "We begin with the proposition that where there is a doubtful factual question as to whether an injury arises out of employment, the law presumes compensibility." (*Id.*, p. 260).

Judge Gershuny in his opinion denying benefits to Riley stated as follows:

> "The record, in my judgment, is free of doubt and permits no other findings as to the credibility of Claimant and Sutherland." (Pet. App. 24a)

The decision in *Continental Insurance* thus would not require the use of the presumption in *Riley* until a "doubtful factual question" arises concerning whether an injury "arises out of employment." The Administrative Law Judge in *Riley* stated that he had "no doubt." The decision in *Continental Insurance* is therefore distinguishable from *Eschbach*, supra.

The Federal Respondent also asserts that the language of the Fourth Circuit in *Furlong* v. *O'Hearne*, 144 F.Supp. 266, 271 (D. Md. 1956), aff'd, 240 F.2d 958 (4th Cir. 1957), the language of the Fifth Circuit in *Young & Co.* v. *Shea*, 397 F.2d 185, 188 (5th Cir. 1968), *cert. denied*, 395 U.S. 920 (1969) and the Second Circuit language in *Gooding* v. *Willard*, 209 F.2d 913, 916 (2d Cir. 1954) constitute dicta rather than the holding of the case in each of those cases. The question whether the presumption applies to the fact of injury is central to those cases and crucial to the finding of the Court of Appeals in *Riley*.

Petitioners' assert that the Federal Respondent's Brief in Opposition supports the Petitioners' contention that a Writ of Certiori to the United States Court of Appeals for the District of Columbia Circuit should be granted in this case. *Riley* is the first reported case where a Court of Appeals has mandated that the presumption of Section 920(a) should be applied not only to injury "arising out of" employment, but also to injury "in the course of" employment. Under the Longshoremen and Harbor Workers Act, the term injury involves both "arising out of *and* in the course of employment." It is asserted that the Court of Appeals usurped the function of the Administrative Law Judge in finding "injury" without a finding that it arose "in the scope of" the claimant's employment. Under the Court of Appeals Decision as it now stands, the District of Columbia Circuit has found an *irrebutable* presumption that the injury

which Riley suffered, occurred in the scope of his employment because he had medical treatment. Upon remand, the Court of Appeals has only asked for further hearing to determine whether or not the injury "arose out of" the claimant's employment. Although the aforementioned issue has been central to this case from the beginning, it is most interesting to note that both the Federal Respondent and the Court of Appeals have ignored this issue. Both Federal Respondent and the Court of Appeals state in footnotes that the *Riley* definition of "injury" does not apply to the "fact of injury." (Opposition Brief p. 5 n. 2 and Pet. App. 10a n. 3). The Federal Respondent states that the Court of Appeals is "obviously using the terms 'injured' and 'injury' in the *layman's* sense of those terms." (Emphasis supplied). The Petitioners' assert that the term should be used and interpreted in its *legal* sense. It is this question presented once again to this Court, which is "fundamental to the further conduct of the case."

2. The Federal Respondent also contends in opposition that upon remand the Petitioners' can present evidence and therefore *are* not "foreclosed" by the Court's decision from argument that the presumption does not apply. (Opposition p. 8 n. 4). While the Court stated that they "cannot anticipate what these findings will be," the Petitioners' assert that the decision of the Court of Appeals forecloses the essential question presented by appeal, concerning whether the Court's application of the presumption makes all "injuries" to be "in the course of employment" by *irrebutable* presumption of law. Upon remand, the Court of Appeals requires review for substantial evidence to rebut the presumption for causalty under §20a but not the "fact of injury." This Petition for Writ of Certiorari seeks definition of the statutory term "injury" with respect to whether there was substantial evidence in the record to

apply the statutory presumption to Riley's injury when the Administrative Law Judge and fact-finder found *no* injury. Upon remand the Administrative Law Judge is to decide now whether Riley's injury was precipitated or aggravated by the ordinary conditions of his employment as a sheet metal worker (Pet. App. 10a-11a) and to consider the applicability of the presumption of causal relationship as applied to the facts of this case. There was no contention previously made by the Respondent Riley or his attorney before the Administrative Law Judge or the Benefits Review Board that "conditions of employment" caused aggravation of the Respondent's arthritis. Petitioners' contend that it is irreversible error to apply the causal relationship presumption to whether Riley's condition arose out of his employment where substantial evidence has shown that no injury occurred "in the course of" that employment in the first place. Petitioners' contend that this case should not be retried on this new issue.

## CONCLUSION

Upon consideration of the Brief and Authorities by the Federal Respondent, it is obvious to the Petitioners' that the Federal Respondent has fallen into the same trap which the Court of Appeals did in dealing with application of the statutory presumption under §920(a) of the Act. Statutory presumptions are now part of the Workers' Compensation Laws of the many states. See 3 Larson, *The Law of Workmens' Compensation*, Section 80.33. Before the presumption of work-related injury applies, however, it is clear under the decisions, including the Federal decisions cited by both Petitioners' and Federal Respondent, that a worker's injury must occur in the course of employment *before* the statutory

presumption applies to presume that the injury "arises out of employment." The Court of Appeals in its opinion stated that "no decision of this Court has ever failed to apply the presumption to any facet of any claim before it." (Pet. App. 9a-10a). This was the Court of Appeals' error; to apply the presumption where the Administrative Law Judge in his findings found that no injury, as defined by the statute, ever occurred. By finding that "the statutory presumption is not limited to the inference of a work-related incident from the injury . . ." (Pet. App. 10a), the Court of Appeals has ignored all established precedents in rewriting this Worker's Compensation statute to require only that the injury "arise out" of employment but not occur "in the course of" employment. Petitioners' assert that if the scope of this statute is to be changed, it should be done by Act of Congress not by the District of Columbia Circuit.

The Petition for Writ of Certiorari should be granted.

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